

ARTICLE APPEARED  
ON PAGE B5

NEW YORK TIMES  
26 November 1984

## Role of 'Side Bar' Conferences at CBS-Westmoreland Trial

By M. A. FARBER

On Oct. 11 — while the lawyer for Gen. William C. Westmoreland was offering his opening statement in the general's libel suit against CBS in Federal District Court in Manhattan — the attorney for the network moved for a mistrial.

The request was made not in open court, where the jury or the press or the spectators could hear it. It was made at a whispered, private conference between the lawyers and Judge Pierre N. Leval, at the side of the judge's raised, massive wood bench that is farthest from the jury box.

The motion by David Boies, who objected to the "misuse of evidence and argument" by his opponent, Dan M. Burt, was denied. But many times since, in the trial that will go into its eighth week today with General Westmoreland returning to the stand, Mr. Boies or Mr. Burt have interrupted testimony to avail themselves of the legal procedure known as the "side bar" conference.

"May we approach the bench," one or the other lawyer will say. "May we approach at side bar." And, generally, Judge Leval will allow them. Occasionally, the judge himself asks for the conferences, where discussions have ranged from the accessibility of "truth" to the relevance of a "inflammatory incident" like the My Lai massacre in Vietnam in 1968 to cryptic references to data apparently obtained by "Martian photography" and "side-looking airborne radar."

### Focusing Case for Jury

The side bar conferences, in a trial of this length and complexity even more than in many simpler proceedings, play a significant role in helping the judge and the lawyers to ultimately focus the case for the jury. They also provide unusual insights into the legal maneuvering inherent in major trials. And they can deal with the esoteric.

At one side bar, Judge Leval barred introduction of a statement made some time before the trial by a witness for General Westmoreland who, according to Mr. Boies, said it was possible to escape the effects of a nuclear explosion by "walking one hour, 59 minutes" away from the hit "and then placing oneself behind a lilac bush."

General Westmoreland, who commanded American forces in Vietnam between 1964 and 1968, contends in his \$120 million suit that he was defamed on a 1982 CBS Reports documentary titled "The Uncounted Enemy: A Vietnam Deception."

The broadcast, he says, falsely accused him of deceiving President Johnson and the Joint Chiefs of Staff about the size and nature of enemy strength in Vietnam in the year before the Tet offensive of January 1968 — mainly by the "tactic" of removing the self-defense forces from the official military listing of enemy strength and by imposing an "arbitrary" ceiling of 300,000 on reports of enemy forces.

CBS insists that the documentary — which alleged a high-level "conspiracy" to "suppress" critical intelligence on the enemy in 1967 — was true.

To prevail, General Westmoreland must prove that statements made on the broadcast were libelous, were "of and concerning" him, were false and were made with knowledge by CBS that they were false or with reckless disregard for whether they were true.

Most of this legal battle, like any other, is being fought in the open, with Mr. Burt arguing there was an open debate over enemy strength with everyone in the intelligence community knowing all the numbers and with Mr. Boies saying the debate was not a "good faith one" in which Washington was given all the facts. While these arguments are made for all to hear, just as they would hear testimony, the arguments advanced at the "side bar" conferences — where Mr. Burt once got so excited that he apologized for "the heat" of his remarks — can be found only in the transcripts of each day's proceeding. Judge Leval has admonished the jury not to be "influenced" by what they read about the case.

Disputed exhibits are ruled in or out on the basis of what is said at the side bar conferences. A lawyer is told whether he can pursue a particular line of questioning. And importantly, Judge Leval and the lawyers struggle over how to confine the evidence or testimony to the case's parameters.

"I am not going to allow this trial to be broadened into some kind of historical inquiry of how we fared in Vietnam," the judge cautioned the lawyers at one side bar, "whether we won or lost, what the reasons were, whether the President and Chiefs of Staff were aware or unaware of the size of the enemy strength."

The issue in the trial, the judge stressed, was whether General Westmoreland "attempted to deceive."

It was not, he said, whether the American people or their leaders — with their multiple sources of information — were actually misled about the strength of North Vietnamese or Vietcong forces — a subject that, he said, "has a great capacity to confuse and misdirect the jury."

Nor, the judge said, was the issue whether "we were prepared or unprepared" for the Tet offensive. The documentary charged that, as a result of the intelligence deception — which, it said, included the "systematic blocking" of reports that North Vietnamese infiltration into South Vietnam was quadruple

the rate made known — the President, the Joint Chiefs and American troops were left "totally unprepared for the size" of the Tet attack.

Still, Judge Leval conceded that it was impossible to set a "blanket" rule barring all testimony in this area.

With respect to the real size of the enemy, Judge Leval said at a side bar, "there isn't any definitive truth to be nailed down — what we are talking about is all estimates." For example, he said, evidence of infiltration into South Vietnam was nothing but "hearsay, except by posting yourself on the Ho Chi Minh Trail with a counter and going click, click, click as they run by."

Even as the jury listens to hour after hour of testimony about such matters as infiltration, the firing of a lieutenant colonel in Vietnam who, according to the documentary, wanted to report higher figures, and an assertion on the broadcast that officers had been ordered to tamper with enemy strength data in a military computer after the Tet attack, CBS lawyers are arguing, at side bars, to stop the discussion.

The broadcast, Mr. Boies complained to Judge Leval, was "being picked apart" by Mr. Burt to include matters unrelated to General Westmoreland, that have no place at the trial, and were inevitably going to "prejudice" the jury. In any event, Mr. Boies said, he wanted to "make a record" for appeal if CBS loses the case.

"I understand your point," said Judge Leval. "I think it's well put."

But the judge said that, for now, he was ruling against Mr. Boies. The documentary, he said, was "susceptible to the understanding" that these actions "were part of a chain of conspiratorial" and "improper" conduct ordered by General Westmoreland.

At one side bar, where he accused a witness of "lying," Mr. Boies said he and Judge Leval obviously differ "about the appropriate scope of cross-examination." At another, he objected to General Westmoreland's "speeches" from the stand. At others, he and Mr. Burt clashed over the introduction of notes or "outtakes" — unused portions of television film — that were made during the preparation of the documentary.

When Mr. Burt said the outtakes were "just like reporter's notes," Mr. Boies retorted: "But not every reporter's note is admissible." Judge Leval told Mr. Burt that, before he could play portions of the outtakes for the jury, he had to demonstrate the ways in which they might show that CBS "acted with knowing or reckless falsity."